United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7109

To be argued by:
LEON SILVERMAN

IN THE

United States Court of Appeals

For the Second Circuit

DAVID BECKER and MARGARET B. LEDDER,

Plaintiffs-Appellants,

vs.

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION,

Defendants-Appellees.

BRIEF OF THE APPELLEES

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BRIEF OF THE APPELLEES

Counter-Statement of Issues Presented

1. Did the District Court abuse its discretion in holding that plaintiffs, who were already members of a class in a previously certified class action raising issues similar to those raised in the case at bar, should intervene in that action rather than permitting them to maintain a second class action raising these issues?

2. Did the District Court abuse its discretion in finding, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, that a class action was not "superior to other available methods for the fair and efficient adjudication of the controversy," when there was a previously instituted certified class action, on behalf of a class of which plaintiffs were members, in which similar issues were raised?

3. Are plaintiffs barred by virtue of the principles of *res judicata* or estoppel from maintaining an action under the federal securities laws challenging a merger and proxy statement when previous claims made under these laws challenging the same merger and proxy statement, and asserted on behalf of a class of which plaintiffs were members, have been dismissed on the merits after trial for failure of proof?

Counter-Statement of the Case

As plaintiffs' brief indicates (Br. 2-3)*, they are former minority shareholders of BHM Industries, Inc. ("BHM"),** and instituted this action under the federal securities laws with respect to a December 1969 merger of BHM and its controlling shareholder, Schenley Industries, Inc. ("Schenley"), by which plaintiffs' BHM stock was converted into Schenley preferred stock. The defendants are Schenley, its then parent, Glen Alden Corporation ("Glen Alden"), and Glen Alden's then parent, Rapid-American Corporation ("Rapid"). The claim is that the merger proxy statement was false and misleading and was utilized by defendants to acquire BHM minority stock at less than its true value.

Prior to the institution of this action, a series of actions had been commenced in the United States District Court for the Southern District of New York and had been consoli-

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* References without a prefix are to the Appendix. References preceded by "Br." are to appellants' brief.

** BHM was essentially a holding company whose only operating asset was its 100% interest in the stock of The Buckingham Corporation ("Buckingham"), the American distributor of Cutty Sark scotch whisky (38).

dated under the title of *Dorothy L. Cole, et al.* v. *Schenley Industries, Inc., et al.*, and a consolidated and amended complaint had been filed (the "*Cole* complaint"). The *Cole* complaint named as defendants, *inter alia*, Schenley, Glen Alden, and Rapid. It dealt in large part with a 1971 merger involving Schenley and Glen Alden. But it also contained substantial claims relating to the prior 1969 BHM-Schenley merger, including particularly the claim that the 1969 merger proxy statement was false and misleading.

Thus, paragraph 22(b) of the *Cole* complaint alleged:

> "The November 17, 1969 Proxy Statement failed to disclose, as required, that a ready market existed for the sale of the shares at a price substantially higher than their book value as reflected on the books of Schenley and Buckingham. Such failure to disclose also rendered untrue and misleading those portions of the 1969 Proxy Statement that stated (i) the Buckingham shares per the latter's books had a book value of $7.31 per share (page 11); (ii) the market price of BHM common stock to be in the range of $19 to $23.75 per share in the four and one-half months that preceded the November 17, 1969 Proxy Statement (page 16), and (iii) that no firm offers for the Buckingham common were received and no negotiations were commenced in the year prior to November 17, 1969 (page 16)." (322-323)

This claim itself—that the proxy statement failed to disclose "that a ready market existed for the sale of the shares at a price substantially higher than their book value as reflected on the books of Schenley and Buckingham"—is virtually identical to the basic claim made in the present case, as plaintiffs state it in their brief, that the same proxy statement "was false and misleading in that it misrepre-

sented the true value of BHM and therefore the value of the stock owned by its minority shareholders" (Br. 3).*

Similarly, paragraph 32 of the *Cole* complaint alleged that the "assets, goodwill and business" of Buckingham ** were appropriated "at prices substantially below their fair value at the expense of the minority stockholders of . . . Buckingham and in violation of their rights and privileges as such stockholders" (331). It also alleged that Schenley acquired these minority shares "at prices substantially less than their fair value", "by the concealment of material facts which depressed the market prices of Buckingham shares in 1969," and "by the use of an untrue and deceptively misleading Proxy Statement . . . dated November 17, 1969 . . . under which Schenley acquired all of the remaining shares of Buckingham at about 60% of their fair value . . ." (331-332).

It was further alleged, in paragraph 33(b) of the *Cole* complaint, that defendants "had negotiations and had received good faith offers from third persons to purchase Schenley's interest in Buckingham," and that the failure to disclose those alleged negotiations and offers rendered the 1969 proxy statement "untrue and misleading" (334). The *Cole* complaint went on to allege at length a number of other respects in which the 1969 proxy statement was claimed to be false and misleading (333-337).

In short, the *Cole* complaint made the identical claim as is the basis of the present case—that the minority stock of BHM was acquired at a price substantially below its actual value in the 1969 merger, by means of a false and misleading proxy statement which concealed its true value.

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* Similarly, the specific claim in *Cole* that the proxy statement was misleading in its statement that "no negotiations were commenced" for the sale of Buckingham is identical to the claim made in the present case, as plaintiffs state it, that the "proxy statement concealed that Schenley had discussed the sale of Buckingham with . . . its ultimate purchaser . . ." (Br. 12).

** In the *Cole* complaint, "Buckingham", which, as noted, was BHM's only operating asset, was continually used interchangeably with "BHM".

In May of 1973, the *Cole* case was declared to be a class action, on behalf of all persons who held Schenley stock at the time of the announcement of the 1971 merger (372-373). This class necessarily included the plaintiffs in the present case, who had received Schenley preferred stock in the 1969 merger, and retained such stock until the 1971 merger. Thus, the present plaintiffs were now part of a class, as certified in the *Cole* case, which was claiming, among other things, that the 1969 proxy statement was false and misleading, and that the 1969 merger had resulted in the acquisition of the BHM minority shares "at prices substantially less than their fair value."

The present case was initiated in the United States District Court for the Northern District of Illinois in December of 1971, well after both the 1969 and 1971 mergers were consummated. On motion of defendants, it was transferred to the United States District Court for the Southern District of New York in part "because there are pending cases [the *Cole* cases] in that district involving similar issues of fact and law . . ." (160).

When, after the transfer, the initial application was made in 1972 to have the present action declared a class action, it was pointed out to plaintiffs that the same claims about the 1969 proxy statement were being made in the *Cole* case. Plaintiffs declined, however, to seek intervention in that case.* Thereafter, in an opinion on discovery issues, the District Court, per Judge Tenney, noted that the *Cole* case "involves the same transaction which is in dispute in the instant case (as well as other transactions)" (*Becker*

* Judge Tenney denied this initial application on the ground that plaintiffs had not established a substantial possibility that they would prevail on the merits (166)—a factor which the Supreme Court subsequently held could not be considered in making class action determinations. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974).

v. *Schenley Industries, Inc.*, Memorandum Decision filed October 15, 1973, p. 3).

Again, when plaintiffs renewed their class action application in 1974—after the *Cole* case had been designated as a class action, with plaintiffs as members of the *Cole* class—it was suggested that they intervene in *Cole*.* Indeed, it was pointed out to plaintiffs that, since they were members of the certified *Cole* class, the validity of the 1969 proxy statement was actually being litigated *on their behalf* in the *Cole* action. Again, however, plaintiffs declined to do so.

In October of 1975, Judge Motley denied plaintiffs' renewed class action application (247-251).** She pointed out that "paragraphs 22(b) and 32(b) of the amended complaint in *Cole* make clear that, as here, the BHM-Schenley merger and proxy statement are in issue in *Cole*." Thus, she held that "Since class action status has already been granted in *Cole* (60 F.R.D. 81 [S.D.N.Y. 1973]), the court concludes that the maintenance of the instant case as a class action would be duplicative and inconsistent with the objectives of Fed. R. Civ. P. 23(b)(3)" (249-250).

The Court, in addition to noting that the claims made in *Cole* encompassed those made in the present case, pointed out that certain plaintiffs who had brought one of the constituent actions in *Cole* (the *Stiller* plaintiffs) were "in the identical position as plaintiffs here—former stockholders of BHM who exchanged BHM shares for Schenley preferred shares and later exchanged Schenley shares in the Schenley-Glen Alden merger" (249).*** These identically situated plaintiffs were two of the plaintiffs who were

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* This suggestion was made in briefs which are on file in the District Court.

** This decision is reported at 20 F.R. Serv. 2d 1225 (S.D.N.Y. 1975).

*** The Court accordingly found that the instant plaintiffs were not members of the only possible class that was not covered by *Cole*—those former BHM shareholders who had sold their Schenley stock prior to the Schenley-Glen Alden merger—and therefore could not be proper representatives of any such class.

certified as proper class representatives by the Court in *Cole*.

The Court noted further that under Rule 23(b)(3), a class action can be maintained only "when the court is satisfied that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy' ", and that the Rule specifically enumerated, as one of the factors to be considered in this regard, "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." The Court, considering this factor, concluded that "a class action would not be the superior method of resolving the instant case." It found further that, particularly in light of the fact that the *Cole* case was scheduled for imminent trial, "maintenance of a class action here would be an unnecessary drain on the resources of the court and the litigants," and that the maintenance of "duplicative class actions" in this situation would "increase the likelihood of inconsistent outcomes" (250).

The Court pointed out in conclusion that plaintiffs had an obvious remedy if they believed that their interests were not adequately being protected in any way in the *Cole* litigation:

> "If plaintiffs consider their interests inadequately protected by the *Cole* litigation, as members of the *Cole* class, plaintiffs may apply to intervene in that case" (250-251).

Despite this explicit invitation by the Court, plaintiffs again declined to seek intervention in *Cole*, and that case proceeded to trial without them in October of 1975. Instead, plaintiffs sought again to have the present action declared a class action, by moving to "alter" the Court's order denying their prior motion (280). This motion was denied

in January 1977, and defendants were granted summary judgment after having tendered to plaintiffs the sum of $4,675, constituting the full amount of their claimed individual damages, including interest (294-295).

Meanwhile, after a two-week trial, a decision in favor of the defendants was rendered in the *Cole* case in November of 1976. In that decision, Count I of the *Cole* complaint, which included the aforementioned claims relating to the 1969 merger and proxy statement, was "dismissed for failure of proof" (489).*

POINT I

The District Court's denial of class action certification was clearly a proper exercise of its discretion.

We submit that it is inconceivable that the District Court abused its discretion in denying class action designation in the circumstances of this case. The Court explicitly applied the standard set forth in Rule 23(b)(3)—whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy"—after considering the factors mandated by the Rule, including particularly "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class."

Moreover, plaintiffs obviously had another, most readily available means by which to have their claims determined—through intervention in the *Cole* case, where the same claims had already been asserted on behalf of a class which included plaintiffs as members. In light of these circumstances, the District Court's determination not to permit

* An appeal from the *Cole* decision is presently pending in this Court, Docket No. 77-7125.

duplicative class actions, to avoid undue burdens on the parties and on judicial resources, and to eliminate the possibility of inconsistent results, cannot seriously be questioned.

(a) The applicable legal standards.

The courts have made it clear that the determination of whether an action can be maintained as a class action—and particularly whether a class action is the "superior" method of resolving the controversy—is one which is peculiarly within the discretion of the trial judge. Thus, for example, in *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969), the District Court had determined that the action should not proceed as a class action, finding that a class action would not be the "superior" method of proceeding. When plaintiff sought to appeal this determination, the Court emphasized that in this area, "the judgment of the trial judge should be given the greatest respect and the broadest discretion" (410 F.2d at 298), and concluded:

> "[The District Court's] views that the action should best proceed not as a class action were condensed in his Memorandum Endorsement. In so deciding, it would seem that he was acting within the very discretionary area which new Rule 23 gives to the trial judge.
>
> "The decisions themselves demonstrate the breadth of this discretion. The particular trial judges charged with the responsibility of the trial and with their eyes on its manageability should exercise their discretion in the light of the particular facts presented." (410 F.2d at 300)

The same principle has been continually stated by the circuit courts. In *Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975), the Court said:

> "In deciding whether to allow a class action, a primary determination to be made is whether the class action is superior to, and not just as good as, other available methods for handling the controversy, and such a determination lies in an area where the trial court's discretion is paramount."

In *Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Co. of Texas,* 511 F.2d 1073, 1077 (10th Cir. 1975), the Court noted that "Class action certification is discretionary with the trial judge". *See also, e.g., Wright* v. *Stone Container Corp.,* 524 F.2d 1058, 1061 (8th Cir. 1975) ("The trial court is, of necessity, clothed with a good deal of discretion in determining the appropriateness of a class action"); *Hornreich* v. *Plant Industries, Inc.,* 535 F.2d 550, 552 (9th Cir. 1976) ("Determination of right to bring a class action under Rule 23, F.R. Civ. P., is in the considered discretion of the trial court").

Not only is the class action determination one which is particularly within the trial court's discretion, but, in addition, the trial court's discretion in this regard has continually been upheld where, as here, it has been exercised so as to avoid duplicative class actions, or where the plaintiff has other, less burdensome methods available by which to resolve the controversy. Indeed, class actions have not been permitted to proceed where there were prior actions pending involving the same defendants, and presenting similar or related issues. In such situations, it has been found that a class action was not "superior to other available methods for the fair and efficient adjudication of the controversy," as required by Rule 23(b)(3).

For example, in *Kamm* v. *California City Development Co.*, 509 F.2d 205 (9th Cir. 1975), the Court of Appeals affirmed the District Court's determination that a class action was not a superior method of adjudication since, *inter alia*, there was already a pending state action involving the same conduct, even though the claims made in the state action were not identical to those in the federal action, and the state action involved relief only for a portion of the claimed class in the federal action.

Plaintiffs in *Kamm* were investors in land who alleged that the promoters of the land sales, among other things, violated federal securities and land sales statutes. California state officials had commenced a prior action in state court against four of the defendants in the federal action seeking to impose state liability for the same transactions that were involved in the federal action. The state action was settled with the defendants permanently enjoined from engaging in deceptive land sales practices and with their agreeing to offer restitution to certain of the purchasers of land.

The District Court held that under these circumstances, a class action could not be maintained. The Court of Appeals, noting that the "trial judge has broad discretion in making this determination" (509 F.2d at 210), affirmed, despite the fact that "not all members of the class appellants seek to represent will be protected by the [state] settlement, nor will the class recover an amount that is even close to that sought in the class action" (509 F.2d at 211). It pointed out, among other things, that a "class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level"; that "No member of the class is barred from initiating a suit on his own behalf"; and that "Defending a class action would prove costly to the

defendants and duplicate in part the work expended over a considerable period of time in the state action'' (509 F.2d at 212).

Plaintiffs argued before the Court of Appeals that the state action (1) did not involve the same controversy as the federal action, (2) did not include all the defendants in the federal action, and (3) did not provide restitution to all persons proposed to be included in the federal class action. The Court of Appeals rejected these arguments, stating that:

> ''We cannot agree that these differences render the state action so different a controversy that it should not have been considered by the district court in determining whether the class action was superior to alternative methods''

since

> ''. . . both actions involve the same fraudulent conduct of the defendants and both seek to provide relief for those injured thereby.'' (509 F.2d at 213.)

In *Mitchell* v. *Texas Gulf Sulphur Company,* 446 F.2d 90 (10th Cir.), *cert. denied,* 404 U.S. 1004 (1971), the District Court had denied class action certification in an action for damages for violations of the federal securities laws. The Court of Appeals for the Tenth Circuit affirmed this determination, finding that the District Court had ''wisely exercised its discretion'' (446 F.2d at 107) in light of other actions pending involving the same transactions, including actions which had been certified as class actions in the Southern District of New York.

The courts have also, as in the present case, emphasized intervention in an existing action as a means of assuring that the plaintiff has his ''day in court,'' and as far more desirable than the maintenance of duplicative class actions.

In *Davis* v. *Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), for example, a class action had been declared involving claimed segregation in a particular school system. Subsequent actions were then commenced by certain school administrators in the district involved, seeking to raise, in part, claims other than those which had been raised in the initial action. The Court of Appeals affirmed the District Court's determination that the new actions could not be maintained as class actions, since plaintiffs could raise their claims through intervention in the original action. The Court found, in this regard, that "Intervention will serve to avoid a proliferation of litigation over the same subject matter, and is within the spirit of Rule 24(b) F.R. Civ. P." (517 F.2d at 1049).

Similarly, in *Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Co. of Texas*, 511 F.2d 1073 (10th Cir. 1975), the Court of Appeals upheld the denial of class action certification in part because "there was prior litigation in which [plaintiffs] could have been, but were not, joined and in which they could have, but did not, intervene" (511 F.2d at 1078). The Court noted further that the plaintiffs "had notice of the situation and slept on their rights. They did not seek to intervene in a previous civil antitrust action. . . ." (511 F.2d at 1079).

This Court has reached the same result in analogous situations. In *Williams* v. *Wallace Silversmiths, Inc.*, F.2d , slip op. 2181 (2d Cir. March 4, 1977), the Court, in holding that the denial of class action certification was "interlocutory and nonappealable," pointed out that ". . . the denial of class action certification here will not preclude plaintiffs from obtaining the complete relief they seek, because appropriate representatives of the subclasses may intervene in this action or bring an action of their own"

(slip op., at 2188). In *Levine* v. *American Export Industries, Inc.*, 473 F.2d 1008 (2d Cir. 1973), the Court dismissed the appeal of proposed class representatives who sought to challenge an order of the District Court which, *inter alia*, stayed the filing of purported class and derivative actions similar to those already pending, and ordered plaintiffs' "purported class action" consolidated with three prior derivative suits involving similar facts. And in *Schiff* v. *Metzner*, 331 F.2d 963 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964), the Court denied review of an order which had refused to modify a stay of a derivative action that had been instituted subsequent to prior actions involving similar facts, pointing out that "No type of case is more appropriate for 'economy' than derivative suits by stockholders" (331 F.2d at 965).

Similar principles have also been expressed continually by the district courts. In *Gordon* v. *Fundamental Investors, Inc.*, 362 F.Supp. 41 (S.D.N.Y. 1973), the Court dismissed a purported class action in part because plaintiff had "failed to intervene" in an action against "substantially the same defendants" that had previously been settled, finding that in these circumstances it would be "inequitable to impose additional liability on the same defendants." In *Brandt* v. *Owens-Illinois, Inc.*, 62 F.R.D. 160, 172 (S.D.N.Y. 1974), the Court held that an action could not be maintained as a class action in light of an earlier class action making similar claims, noting that the second plaintiff, as a member of the initial class, "may of course intervene through his counsel if he considers his interests inadequately protected." And in *Barkal* v. *Chas. Pfizer & Co., Inc.*, 51 F.R. D. 504, 505 (S.D.N.Y. 1970), the Court held that it would be "wholly inappropriate and improper" to grant plaintiff's class action motion where purported class members were already included in classes previously pro-

posed or designated in other litigation involving similar claims. *See also, e.g., Hainick* v. *Ludekens,* [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,908 (S.D.N.Y. 1973); *Rosenfeld* v. *Schwitzer Corp.,* 251 F.Supp. 758 (S.D.N.Y. 1966).

(b) The District Court's denial of class action status was plainly proper.

There can be no question that the principles expressed in all of these cases are applicable here. It is undeniable that the validity of the 1969 proxy statement was squarely raised by the *Cole* complaint; indeed, the claims relating to the 1969 transaction were virtually identical to those made in the present case, and, in fact, were far more extensive. And it is also undeniable that these claims were, as in the present case, that the 1969 merger was unfair, and the proxy statement misleading, as to the same persons—the former Buckingham or BHM shareholders; the *Cole* complaint alleged, in this regard, that defendants, by means of the 1969 merger and proxy statement, appropriated the BHM minority shares "at prices substantially less than their fair value . . . by the concealment of material facts . . . and . . . by the use of an untrue and deceptively misleading Proxy Statement" (331-332). And, of course, the three defendants in the present case were all defendants in *Cole.* We submit, in short, that it is inconceivable that the District Court could have exercised its discretion in any other manner.

Plaintiffs' principal answer to these indisputable facts appears to be that, irrespective of the claims raised by the *Cole* complaint, the pre-trial order and trial in *Cole* show that the validity of the 1969 proxy statement and merger was not adequately litigated in that action. In the first place, this is not true factually. While the prime focus of the *Cole* case as it was developed by plaintiffs' counsel was

certainly the 1971 merger, the pre-trial order in *Cole* included substantial material with respect to the 1969 transaction and the issues involved in the present case.

Thus, in the order, the *Cole* plaintiffs spent substantial time addressing themselves to the allegedly "misleading proxy statement dated November 17, 1969" (441), and set forth various respects in which this proxy statement was allegedly false and misleading (442-443). Further, they claimed that defendants' "practices" from 1969 through 1971, including their "practices" relating to the 1969 merger and proxy statement, "taken as a whole, constituted an illegal scheme or course of business to defraud the minority stockholders" (447)—stockholders who, of course, included the plaintiffs in the present case.

The pre-trial order contained a number of additional references to the transactions involved in the present case (*e.g.*, 384, 399, 401, 404, 405, 420, 424, 438). Moreover, it indicated that the *Cole* plaintiffs intended to submit at trial a number of exhibits relating to the 1969 transaction, including the very proxy statement challenged in the present case, several prior proofs of this proxy statement, correspondence with the SEC relating to it, and Buckingham's financial statements (*see* 471-478, items 2, 66, 76, 77, 80, 115, 116, 117, 118).*

Moreover, at the trial itself, a number of exhibits, and substantial testimony, were introduced with respect to the 1969 transaction. Thus, there was extensive testimony by Schenley's chief financial officer as to all of the negotia-

* In light of this, it is puzzling how plaintiffs can say that the exhibits listed in the order do not include the 1969 proxy statement or Buckingham financial statements (Br. 22). By the way, we note that there was only one 1969 proxy statement relating to this merger, which was sent to both Schenley and BHM shareholders (13). Plaintiffs appear to be under the misapprehension that there were separate BHM and Schenley proxy statements (Br. 21-22).

tions leading up to the sale of Buckingham, including contacts made with prospective purchasers—testimony directly relevant to the present plaintiffs' claim that the true value of Buckingham was somehow concealed. In addition, exhibits introduced included, *inter alia,* the challenged 1969 proxy statement itself, the Buckingham financial statements throughout the period in question, a portion of the affidavit prepared by White, Weld & Company which the present plaintiffs purport to rely on (Br. 10-11), and the memorandum of understanding and ultimate agreement relating to the sale of Buckingham by Schenley.*

But what actually happened in the *Cole* litigation is ultimately beside the point. For if, in plaintiffs' view, the claims relating to the 1969 merger were not adequately presented or sufficiently pressed in that action, or if plaintiffs' so-called "*prima facie* case" (Br. 10) was not properly presented to the *Cole* court,** plaintiffs obviously have no one to blame but themselves.

For it was continually suggested to them that they intervene in the *Cole* case so that all the issues with respect to the 1969 merger and proxy statement could be litigated in the same action; indeed, plaintiffs were well aware of the *Cole* case from the outset, since the existence of that case was one of the principal reasons why defendants' transfer of venue motion was granted in early 1972. Intervention in *Cole* was explicitly suggested after that case was declared to be a class action in 1973—with the present plaintiffs themselves as members of the class. And finally, the Dis-

* All of this material can be found in the record on appeal in the *Cole* case, which is presently before this Court.

** Plaintiffs' statement of these purported "facts" (Br. 10-12) is almost entirely incorrect, as was pointed out at length in memoranda to the District Court which are on file in that Court. Since none of this has any relevance whatever to the issues before this Court, we will not burden the Court with this material.

trict Court, in denying plaintiffs' renewed class action application, specifically stated that "If plaintiffs consider their interests inadequately protected by the *Cole* litigation, as members of the *Cole* class, plaintiffs may apply to intervene in that case." (250-251.)

The Court's suggestion was singularly timely, since the *Cole* case was scheduled to go to trial the next month, and plaintiffs could easily have taken the "*prima facie* evidence" they had supposedly developed over to the *Cole* courtroom, and presented it to the Court, or at least to class counsel who were trying that case for the *Cole* plaintiffs. But plaintiffs steadfastly refused to do this, and purposefully determined to permit the *Cole* case to proceed to trial and decision without the benefit of their presence or this "evidence."

In short, plaintiffs have been offered their "day in court" time and again, and each time have chosen not to proceed. In the words of the Court of Appeals in *Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Co. of Texas, supra,* 511 F.2d 1073, 1079 (10th Cir. 1975), plaintiffs "had notice of the situation and slept on their rights...." In these circumstances, they have no conceivable cause for complaint.*

We note, finally, that the other arguments which plaintiffs make simply have no factual support. Thus, for example, plaintiffs are mistaken when they say, as they do in different forms throughout their brief, that the claims

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* Although it was not necessary for its decision, the District Court was also clearly correct in finding that plaintiffs could not represent a class comprised of the only persons not covered by the *Cole* class, those BHM shareholders who received Schenley stock in the 1969 merger, and sold that stock prior to the 1971 merger. It is, of course, black-letter law that a "litigant must be a member of the class which he or she seeks to represent. . . ." *Sosna* v. *Iowa,* 419 U.S. 393, 403 (1975); *Bailey* v. *Patterson,* 369 U.S. 31, 32-33 (1962).

made in *Cole* relating to the 1969 merger were that this transaction was unfair and the proxy statement misleading as to *Schenley* rather than BHM (Buckingham) shareholders (*e.g.*, Br. 16, 18, 23). The claim was—as in the present case—that in 1969 Schenley and its parent corporations, by means of a misleading proxy statement, appropriated the "remaining shares held by the public" in BHM "at prices substantially less than their fair value," by, *inter alia*, "the concealment of material facts which depressed the market prices of Buckingham shares in 1969. . . ." (331-332). This is, of course, the identical claim made in the present case. Indeed, plaintiffs necessarily admit that this was, in fact, the claim made in *Cole* (Br. 18); it is, of course, obvious that the alleged depressing of the value of BHM stock could only have harmed the shareholders of BHM, and not those of Schenley, in the 1969 merger.

Another of plaintiffs' themes, also repeated throughout the brief—*e.g.*, "there is no allegation [in *Cole*] that the material facts relative to the value of Buckingham (BHM) concealed in 1969 were still concealed at the time of the 1971 Schenley-Glen Alden merger" (Br. 18)—appears to us to be an utter *non sequitur*. As of 1971, there was no BHM, as the result of the 1969 merger, and the claim in *Cole*, as in the present case, was that the 1969 merger was unfair and the proxy statement misleading *as of 1969*, the only time when such matters had any significance. Actions, including class actions, can, of course, challenge a number of transactions over a period of time, and this is exactly what was done in the *Cole* complaint, which attacked a course of conduct covering the period from 1968 through 1971.

One other argument made by plaintiffs should be laid to rest—that "relief granted in *Cole* could not have been inconsistent with or duplicative of relief sought in the present case" (Br. 26). This, we submit, is plainly incor-

rect. If the plaintiffs in *Cole,* in the class which included the present plaintiffs, had received a recovery on their claim that the BHM minority stock had been appropriated in 1969 for less than its true value by means of a false proxy statement, this would obviously have been directly duplicative of any damages that might have been awarded in the present case. Indeed, it is interesting that plaintiffs played a far different tune in the District Court when they said, among other things, that plaintiffs in *Cole* and in the present case "present directly antagonistic claims to the same fund" (176), since "[i]n the present action the recovery of the excess value of BHM will be divided solely among the BHM minority" while "[i]n *Cole* the recovery of the same BHM excess value would be divided among all the Schenley shareholders. . . ." (200).

The point is that, in any event, any conflicts or overlaps in rights or remedies could have been resolved in the *Cole* case, with all of the parties before the Court. For example, a subclass could have been created which included persons such as the present plaintiffs, and the *Stiller* plaintiffs in *Cole,* who were both BHM shareholders at the time of the 1969 merger and as a result thereof became and continued to be Schenley shareholders at the time of the 1971 merger. In any case, it would have made no sense for these shareholders to have recovered twice for the same alleged wrongs, or to have litigated the same issues in two courts.

In sum, the District Court was clearly correct in refusing to permit duplicative class actions, and in requiring that the issues raised with respect to the 1969 merger and proxy statement be litigated in the same action.

POINT II

Defendants' motion for summary judgment was properly granted.

Plaintiffs do not dispute that if the District Court did not abuse its discretion in denying class action designation, defendants were properly granted summary judgment on the basis of mootness after tendering to plaintiffs the full amount of their individual damages (see Br. 35). This is clearly in accordance with the applicable legal principles. *See, e.g., North Carolina* v. *Rice*, 404 U.S. 244 (1971); *California* v. *San Pablo and Tulare Railroad Co.*, 149 U.S. 308 (1893); *Pearson* v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Lamb* v. *Commissioner of Internal Revenue*, 390 F.2d 157 (2d Cir. 1968); *Drs. Hill & Thomas Co.* v. *United States*, 392 F.2d 204 (6th Cir. 1968).

POINT III

Plaintiffs are barred by the principles of *res judicata*, equitable estoppel and collateral estoppel from maintaining the instant action.

Even if it were assumed that the District Court abused its discretion in denying class action status, we submit that the plaintiffs are, in any event, barred by the *Cole* judgment from continuing to maintain this action.

(a) *Res Judicata*

As previously noted, plaintiffs are members of the class as certified in the *Cole* case, and it is undisputed that they did not request exclusion from that class. The very essence and rationale of a class action is that class members

are to be legally bound by a final adjudication in a class action, and it is plain, therefore, that the final judgment rendered in *Cole** binds the instant plaintiffs.**

Since the defendants in the present case all were defendants in *Cole*, the same proxy statement and transaction was challenged in both actions, and the judgment in *Cole* was on the merits, the prerequisites for the application of *res judicata* have all been met.

In its recent decision in *Schmieder* v. *Hall*, 545 F.2d 768 (2d Cir. 1976), this Court noted that "Res judicata is a principle of peace," and stressed the "importance of repose" where parties "had been locked in combat for more than seven long years" (545 F.2d at 771). It also noted the importance of the principle of *res judicata* for proper judicial administration:

> "But we must also attach fundamental significance to the interest of society and the courts in the final resolution of disputes. The explosion of federal dockets in recent years is so notorious as to require no comment. Judicial resources today are an increasingly scarce commodity, and it is of the utmost importance that litigants use them wisely." (*Id.*)

The Court stated further that "Judicial economy ordinarily demands that the whole controversy between the parties should be brought before the same court in the same action" (*id.*), and concluded that in the situation before it:

> "The events constituting [plaintiff's] asserted injury are substantially the same in the two cases.

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* As noted, the judgment in *Cole* is presently on appeal to this Court.

** The District Court in the present case was informed after the *Cole* decision that defendants were seeking dismissal of the present complaint on the grounds set forth in this point, as well as on the basis of mootness. Since the District Court dismissed the case on the basis of mootness, it did not have to pass on these questions.

> All the facts necessary to support [plaintiff's] claim in the second action were alleged or could have been alleged in the first. [Plaintiff] merely wishes the opportunity to advance reasons for recovery not presented to or, in [plaintiff's] view, not adequately considered by Judge Knapp in his initial opinion. To indulge this lavish desire would be an acquiescence in the abuse of the judicial process. [Citing authorities]" (*id.*).

Moreover, as this Court has recognized, the need for finality of adjudication is particularly critical in the area of securities class action litigation, where noncompliance with the provisions of Rule 23 that are designed to achieve *res judicata* effect "would lead to chaos in the management of class actions" (*Berry Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975)). In *Berry*, the Court refused to permit a securities class action on behalf of persons who had been members of the class in another suit (the *Land* action) which had been settled, and who had not personally requested exclusion from the *Land* class. The Court noted that inasmuch as the absent class members were within the *Land* class definition, they were bound by "the res judicata effect" of *Land*, even though the *Berry* litigation "focused on a different transaction than that stressed in *Land*" (518 F.2d at 411, and n.11). *See also*, *Supermarkets General Corp.* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974).

The law is clear that when the prior litigated action challenged the same proxy statement and transaction as in the subsequent action, the doctrine of *res judicata* is applicable even if different theories of liability are asserted in the second action, or the evidence required to establish the second claim differs somewhat from that involved in the

initial action. In *Saylor* v. *Lindsley,* 391 F.2d 965 (2d Cir. 1968), for example, this Court said that when two stockholders' actions "pertain to the same disputed transactions and arise out of the same operative facts," the *res judicata* effect of the earlier suit cannot be avoided by reliance on different "federal theories of recovery" (391 F.2d at 969 n.6).*

In *Saylor,* plaintiff sought to maintain a stockholders' derivative suit alleging that corporate assets were sold for "less than a fair consideration" by means of misrepresentations and omissions to stockholders, in violation of the federal securities laws. The Court said that plaintiff could not avoid the *res judicata* effect of a prior dismissed stockholders' action (*Hawkins*) by adding new theories of recovery, where the "same allegedly fraudulent transactions" were challenged in both suits:

> "Assuming that the first amended complaint is the relevant one, the appellant argues that the addition of federal theories of recovery in the present action makes his claim different from that alleged in *Hawkins,* and, therefore, that the dismissal in *Hawkins* cannot be res judicata here. The argument has no merit, however, because *the allegations in both suits clearly pertain to the same disputed transactions* and arise out of the same operative facts.

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* In the present situation, there are not even differing theories with respect to the 1969 proxy statement as between the present case and the *Cole* case. In each case, the claim is, in essence, that the stock held by BHM minority shareholders was appropriated at less than its true value by means of a false and misleading proxy statement. There are, at most, some differences in the specific allegations as to which particular portions of the proxy statement were misleading or omissive. But it can hardly be claimed that a shareholder should be permitted to challenge particular passages in a proxy statement as misleading after being part of a class action in which other portions are similarly challenged.

> "*In such a case, a new theory does not create a new cause of action.* [Citing authorities]" (*Id.*, emphasis added).

This principle recognized in *Saylor* was applied to dismiss stockholders' claims as *res judicata* in *Ruskay* v. *Jensen,* 342 F.Supp. 264 (S.D.N.Y. 1972), *aff'd on other grounds sub nom. Ruskay* v. *Waddell,* F.2d , slip op. 1827 (2d Cir. February 17, 1977), where the Court reiterated that:

> " . . . *Where the claims for relief in two lawsuits depend on the same operative facts and pertain to the same disputed transactions, they constitute the same cause of action.* Saylor v. Lindsley, 391 F.2d 965, 969 n. 6 (2d Cir. 1968); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 33 (8th Cir. 1964); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 470 (3rd Cir. 1950), cert. denied, 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355 (1951)" (342 F.Supp. at 269, emphasis added).

The Court stated, in language singularly pertinent to the present case in light of plaintiffs' constant refusal to intervene in *Cole,* that

> "plaintiffs cannot reap the benefits of a claim which was consciously avoided before." (342 F.Supp. at 270)

The Court in *Ruskay* also rejected plaintiffs' contention that *res judicata* did not apply since the evidence required to establish the claims in the two suits was not the same:

> "Plaintiffs urge that proof of the claim here would require evidence different from that needed to prove the first actions. The 'same evidence' test

> may be useful as a positive test for determining the identity of claims, but it is not valid as a negative test." (342 F.Supp. at 270-271)

The same result recently was reached in *Berman* v. *Thomson*, 403 F.Supp. 695 (N.D. Ill. 1975). There, as in the present case, shareholders' claims predicated on an allegedly defective proxy statement issued in connection with a corporate merger* were sought to be maintained after the conclusion of other litigation (the *Dasho* case) against the same defendants based on the same proxy statement and transaction. In finding that the *Dasho* action was *res judicata* as to the suit before it, the Court held:

> "It is my conclusion that the claims in *Dasho* and *Berman* are the same. In essence, both complaints assert that a violation of §14(a) of the Securities Act of 1934 occurred when the Susquehanna Corporation issued its proxy statement on November 12, 1965. *Although specific misrepresentations in the two cases differ slightly, the fact remains that, in essence, the same claim or cause of action is being asserted in both situations. See generally Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 71 L.Ed. 1069 (1927). *These two claims depended upon the same operative facts and they involved the same disputed proxy statement; consequently, they constitute the same cause of action. See e.g., Saylor* v. *Lindsley*, 391 F.2d 965, 969 n.6 (2d Cir. 1968); *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30, 33 (8th Cir. 1964)." (403 F.Supp. at 701, emphasis added.)

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* The relevant facts are described in an earlier decision, *Berman* v. *Thomson*, 312 F.Supp. 1031 (N.D. Ill. 1970).

See also, Weston Funding Corp. v. *Lafayette Towers, Inc.*, F.2d , slip op. 1243 (2d Cir. January 4, 1977), where plaintiff sought "to avoid the res judicata effect" of a prior judgment by arguing that the second suit was based on a different written agreement than the first suit, and that "the two agreements give rise to completely independent causes of action" (*id.* at 1246). Despite plaintiff's attempt to draw distinctions between the two "agreements," this Court held that the District Court correctly found that both writings related to the same transaction, and that "regardless of whether plaintiff chooses to sue with respect to" one document or the other, "plaintiff's cause of action remains the same," and was barred by *res judicata* (*id.* at 1247).

We also note that *res judicata* clearly applies when the claims in question in the initial suit were defeated, as the Court in *Cole* found in the present situation, "for failure of proof" (489). *See, e.g., Jamerson* v. *Lennox*, 356 F. Supp. 1164 (E.D. Pa.) (three-judge court), *aff'd*, 414 U.S. 802 (1973), where the Court, in holding that purported class claims were barred by the *res judicata* effect of a prior class action, reiterated that:

> "A final judgment on the merits by a court of competent jurisdiction binds the parties as to every matter which was or could have been offered to sustain or defeat the cause of action. See, e.g., Commissioner v. Sunnen, 333 U.S. 591, 597-598, 68 S.Ct. 715, 93 L.Ed 898 (1948). *This doctrine applies where the earlier suit was lost because of a failure of proof.* Heiser v. Woodruff, 327 U.S. 726, 733, 66 S.Ct. 853, 90 L.Ed. 970 (1946). It applies to the members of a class before the court as well as to the representative parties." (356 F.Supp. at 1166, emphasis added.)

In the present case, it would be singularly inappropriate for plaintiffs to argue that *res judicata* should not apply because the claims were not adequately presented in *Cole*, inasmuch as plaintiffs not only constantly refused to seek intervention in *Cole*, but also did not even bother to present their alleged "evidence"—all of which was known to them at the time of the *Cole* trial—to the counsel trying that case. As the Court stated in dismissing purported securities class action claims as barred by *res judicata* in *Koblitz* v. *Baltimore and Ohio Railroad Co.*, 164 F. Supp. 367, 372 (S.D.N.Y. 1958), *aff'd per curiam*, 266 F.2d 320 (2d Cir.), *cert. denied*, 361 U.S. 830 (1959):

> "To the extent, if at all, that the allegations of the present complaint are dissimilar to those in the prior action, *all the facts now pleaded were known to the plaintiff and could have been presented in the first action.*" (Emphasis added.)

(b) ***Equitable Estoppel***

Since plaintiffs consistently refused to participate in the *Cole* litigation, even after the suggestion by the District Court that they do so, they are hardly now in a position to question the decisions made in that action as to which issues to emphasize. Indeed, we submit that under these circumstances, they should be estopped from maintaining this action in which they seek to relitigate issues which they could have been heard on at the *Cole* trial.

Particularly pertinent in this regard is the recent decision of the Court of Appeals for the Tenth Circuit in *In re Four Seasons Securities Laws Litigation (Phillips* v. *Clark)*, 525 F.2d 500, 503 (10th Cir. 1975). There, after settlement and entry of judgment in a class action, plaintiff sought to maintain another action on the ground that certain facts relating to a criminal investigation of the defend-

ants had not been known to him at the time of settlement and should have been emphasized in the already concluded class litigation.

The Court held that inasmuch as appellant had declined to appear and take part in the class action litigation, "*the appellant by his inaction was bound by the acts and the stated positions taken by the class attorneys* to the same extent as are the actual parties," and was "estopped" from maintaining another action (*id.* at 502-504, emphasis added).

If, as *Four Seasons* holds, a plaintiff will be estopped by his inaction in the context of a judgment upon a class action settlement, *a fortiori,* the present plaintiffs are estopped by their inaction and failure to intervene in the context of a judgment after a lengthy trial—particularly since the present plaintiffs were fully cognizant of the *Cole* litigation and were expressly invited by the District Court to apply for intervention in *Cole.* It would be grossly unfair, as well as contrary to long settled principles of proper judicial administration, for plaintiffs to so take advantage of their own deliberate inaction and put the defendants and the Court to yet another lengthy class action litigation. *See also, Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Co. of Texas,* 511 F.2d 1073, 1079 (10th Cir. 1975) ("Intervenors had notice of the situation and slept on their rights").

(c) *Collateral Estoppel*

Plaintiffs are not only barred by the principles of *res judicata,* and considerations of equitable estoppel, but are also collaterally estopped from relitigating the basic issue raised by the present complaint—whether the minority stock of BHM was acquired at a price substantially below its actual market value in the 1969 merger by means of a false and misleading proxy statement.

Thus, it is indisputable that this issue was explicitly raised by the pleadings in *Cole** and was controverted by the defendants, and that judgment was rendered for defendants on this issue, as on other issues, upon plaintiffs' failure of proof. It is equally indisputable that if the class plaintiffs in *Cole* had proven that BHM minority stock was unfairly acquired by means of a materially false and misleading proxy statement, the Court could not have rendered the judgment it did for defendants. In this situation, it is clear that the principles of collateral estoppel are applicable.

Thus, for example, in *Ritchie* v. *Landau*, 475 F.2d 151 (2d Cir. 1973), the Court, rejecting plaintiff's contention that only "part" of his claim had been presented in prior proceedings, held that the action was precluded by collateral estoppel inasmuch as plaintiff "has already had a fair opportunity to litigate his claim" (475 F.2d at 154). In so holding, the Court stated:

> "Courts should not permit the splitting of causes of action when the result of doing so could result in vexatious litigation for the defendant and undue clogging of the dockets of the court . . ." (*Id.* at 156 n.5).

Again, in *Klein* v. *Bower*, [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,361 at pp. 97,716-97,717 (S.D.N.Y. 1969), *aff'd on other grounds*, 421 F.2d 338 (2d Cir. 1970), judgment in a previous action had been entered dismissing the complaint after presentation of plaintiff's case. When plaintiff sought to maintain a second action,

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* We note again, for example, the allegation in the *Cole* complaint that the defendants acquired "the remaining shares held by the public at prices substantially less than their fair value . . . by the concealment of material facts which depressed the market prices of Buckingham shares in 1969 . . . and . . . by the use of an untrue and deceptively misleading Proxy Statement" (331-332).

the Court held that plaintiff was "barred by principles of collateral estoppel" from raising the previously litigated issues, as broadly defined so as to include alleged "fraud, manipulation and conversion" of securities. *See also, Klein* v. *Spear, Leeds & Kellogg,* 306 F.Supp. 743, 747 (S.D.N.Y. 1969).

See particularly, *Boothe* v. *Baker Industries, Inc.,* 262 F.Supp. 168, 174-175 (D. Del. 1966) (after final judgment was entered in a derivative suit challenging a proxy statement and merger, a subsequent class action, which involved the same transaction but was "based upon a theory different from the derivative action," was barred by *res judicata* or "at least" estoppel by judgment, particularly since plaintiff had had "full opportunity to appear" in the prior action).

The law is clear that the doctrine of collateral estoppel is applicable when the initial decision, as in the present case, is based on plaintiffs' failure of proof, irrespective of the extent of the evidence actually introduced on the issue in question. As the Court pointed out in *United States* v. *Silliman,* 167 F.2d 607, 617 (3d Cir. 1948):

> "If an issue is raised and the party who has the burden fails in his proof and the issue is decided against him, he is just as much bound by collateral estoppel as though he had presented a barrel of testimony. A man cannot offer his cake and expect to keep it in litigation any more than anywhere else."

See also, Restatement, Judgments § 68, Comment f (1942); *Restatement, Judgments Second* § 68, Reporter's Note to Comment d, at p. 164 (Tentative Draft No. 1, 1973) (for purposes of issue preclusion, "an issue may be litigated and determined if the party with the burden of

proof on that issue fails to introduce any evidence with respect to it or introduces evidence but fails to sustain his burden'').

In sum, the present plaintiffs, as members of the *Cole* class, are clearly barred from maintaining this action by *res judicata* and collateral estoppel, as well as by fundamental principles of equity.

CONCLUSION

For the reasons above stated, the decision and judgment of the District Court should be affirmed.

Respectfully submitted,

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May 9, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

DAVID BECKER and MARGARET B. LEDDER, :

Plaintiffs-Appellants, : Docket No. 77-7109

- against - :

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, :

Defendants-Appelles. :

----------x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Alan J. Russo, being duly sworn, deposes and says: that deponent is an attorney and member of the Bar of this Court, and that deponent is not a party to this action, is over 18 years of age and resides at 160 West End Avenue, New York, New York. That on the 9th day of May, 1977, deponent served two copies of the accompanying "Brief of the Appellees" upon:

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Attorney for Plaintiff-Appellants
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(b) Edward Slovick, Esq.
James S. Gordon, Esq.
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by depositing such copies of the same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Alan J. Russo
ALAN J. RUSSO

Sworn to before me this
9th day of May, 1977

Leonard G. Florescue
Notary Public

LEONARD G. FLORESCUE
Notary Public, State of New York
No. 31-4502587
Qualified in New York County
Commission Expires March 30, 1979

Clerk's File No. 77-7109

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID BECKER and MARGARET B. LEDDER,

Plaintiffs-Appellants,

- against -

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION,

Defendants-Appelles.

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